In the Supreme Court of the United States

October Term, 1953

No. 556

JAMES F. HICKEY, an Individual, and BANKERS SECURITIES CORPORATION, a Corporation,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (R. 720-721) on the denial of the Government's motion for a new trial is not reported. The opinion of the court of appeals (R. 731-746), as corrected (R. 772-773), is reported at 208 F. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1953 (R. 746). A petition for rehearing was denied on December 11, 1953 (R.

773), and the petition for a writ of certiorari was filed on January 29, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 61 of the Federal Rules of Civil Procedure, the errors committed by the trial court justified the court below in reversing the judgment and ordering a new trial in order to achieve substantial justice.

2. Whether the errors found by the court below were based upon misunderstandings of the record.

STATEMENT

The United States instituted this condemnation proceeding on February 6, 1951, at the request of the Secretary of the Army, to acquire a lot and building, known as the Penn Athletic Club Building in downtown Philadelphia, for military purposes (R. 1). On the same day a declaration of taking was filed and the sum of $1,250,000 was deposited with the court as estimated just compensation (R. 1).

The property involved includes a 14-story building constructed in 1926 for use as a club (R. 25). It contained stores on the first floor, two swimming pools, a ballroom with balcony and stage, a dining room extending up two floors, a grill room, many private dining rooms, lounges, tennis courts, a gymnasium, etc., and eight floors of sleeping rooms and baths (R. 27-36).

A reorganization of the club which owned the property was had in 1940 under bankruptcy proceedings, but thereafter the club was unable to maintain the payments so that the property was taken over in 1942 by the Girard Trust Company, trustee for the bondholders (R. 576). From 1942 to 1948, the property was leased to the Securities and Exchange Commission (R. 55, 577-578). During that period, the Girard Trust Company "endeavored to interest various purchasers" (R. 579). In 1946, the property was exposed "to an actual open sale" and bids were asked provided they exceeded $1,750,000 (R. 579). No sale was made as a result of that solicitation (R. 580).

In April 1948, the real estate firm of Albert M. Greenfield & Company made an offer to purchase the property for $1,250,000 on behalf of the Bankers Securities Corporation, through a nominee, James F. Hickey (R. 52-54, 63, 66, 580-581). The purpose of the offer was to restore the property to the club at that price (R. 51-52, 142-145).

The directors of the Girard Trust Company presented the offer to the court for approval (R. 580). The court required that the sale be advertised in Philadelphia, New York, and Chicago for the possibility of a higher bid (R. 581, 583-584). None was received so the property was sold on August 30, 1948, for $1,250,000 to the nominee, James F. Hickey (R. 586).

The Penn Athletic Club was unable to secure a sufficient vote of its members to approve purchas-

ing the property (R. 145). Although Albert M. Greenfield & Company was authorized to sell or rent the property it remained vacant from 1948 to the present taking (R. 54, 63, 123-125, 136-137, 177, 182-184, 250, 271, 558). In this period, James F. Hickey filed appeals for reduction of the real estate assessment on the property for the years 1949-1951, in which he stated under oath that the market value was $1,250,000 (R. 594, 597-598).

In the jury trial on the condemnation, the petitioner adduced testimony of fair market value ranging from $3,880,000 to $3,150,000 (R. 61, 72, 75, 172, 238, 268). The Government's witnesses testified to values from $1,575,000 to $1,500,000 (R. 344, 493, 548).

The jury returned a verdict, awarding $2,100,000 (R. 717). Judgment was entered on July 17, 1952, in that sum with interest at six per cent on the deficiency of $850,000 (R. 719). A motion by the Government for a new trial was denied (R. 720). On appeal by the Government, the court of appeals reversed the judgment on October 14, 1953, for the errors discussed hereafter, Judge Goodrich dissenting (R. 731).

ARGUMENT

This case does not present any new or important issue on valuation in condemnation proceedings. The court of appeals merely returned the case for a new trial because of the exclusion of pertinent competent evidence on the valuation issue. This basis of the decision does not warrant the granting

by this Court of a writ of certiorari and analysis of the petition makes it clear that the claims there made are unfounded.

1. There is no conflict with Rule 61, F.R.C.P., relating to "harmless error", as interpreted by this Court, or with those decisions of courts of appeals which have not reversed certain condemnation judgments on matters of evidence (Pet. 3, 10-18). Rule 61 is expressly limited to matter "which does not affect the substantial rights of the parties." "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation." *McCandless* v. *United States,* 298 U. S. 342, 348. In the same case, this Court said of the almost identical predecessor (28 U.S.C. 391) to Rule 61: "This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial" (pp. 347-348). *Kotteakos* v. *United States,* 328 U.S. 750, 764, cited by petitioners (Pet. 11, 13), also allows use of the "harmless error" rule only where "the conviction is sure that the error did not influence the jury."

The decisions of the courts of appeals, relied upon by petitioners (Pet. 13-17), do not support their proposition (Pet. 8) that a condemnation judgment may not be reversed for rulings on admission of evidence because such questions are

within the sole discretion of the trial court. There is no such law in those decisions or elsewhere as to evidence directly affecting the issue of value. The importance of the evidence involved here to the issue of value will be made plain in the following discussion of the contents of the record.

2. The decision of the court of appeals was not based on misstatements of the record requiring review and reversal by this Court. (Pet. 3, 18-20). The following facts from the record as to each situation urged by petitioners amply sustain the correctness of the decision below.

The Government sought to establish that to put this unusual building into adequate condition for the highest and best use testified to (an office building) required expenditure of a considerable sum in repairs and conversion. This, being a matter which a prospective purchaser would consider, entered importantly into the issue of market value. *Olson* v. *United States,* 292 U.S. 246, 257. But the Government was not allowed to develop this at all in its case-in-chief.[1]

The Government sought to introduce estimates of cost through an architect and construction engineer, a civil engineer, and a mechanical engineer, engaged in such work (R. 314-316, 380-381, 427-428, 465, 467). The court refused the testimony

[1] Even in cross examination of one of petitioners' witnesses, an objection to this line of testimony was sustained (R. 285-286).

on the ground that "I think you can only use that testimony in so far as it is the basis upon which any of your experts predicate their judgment. * * * he is called out of turn" (R. 316-318, 382-387, 429, 438, 442, 465, 466). But when the Government placed its valuation expert, Haeberle, on the stand, the court refused to allow him "to put a dollar value" on making the building "habitable for club purposes, or for one tenant occupancy" (R. 543-545). When he was asked "whether he had a judgment of a figure, not to state the figure." the court said: "No I think we will not go into this at all" (R. 545). When he was asked whether he took "the fact that the condition of the building needed repairs and rehabilitation into consideration in arriving at your opinion of fair market value" (R. 545), the court sustained an objection by petitioners' counsel, stating: "I think we ought to leave all reference to repairs and reconversion out" (R. 546). Thus, contrary to petitioners' assertions (Pet. 12, 19), the record more than supports the court of appeals' statement that the Government was not permitted to question "Haeberle, as to his judgment as to the amount that would be necessary to be expended on the building to make it habitable" and "would not allow the United States to prove this important element by way of witnesses offered by it" (R. 740).[2]

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[2] The fact that government counsel failed to oppose the court's directions on this issue, during a pretrial conference, cannot cure the error (Pet. 23-24).

On the same basic question of the need for extensive repairs, the Government's witness, Storey, a mechanical engineer, testified that his inspection of the building, two days after the taking, indicated that the pipes for water, drainage and heating were in a bad state of repair (R. 428-436, 459). On re-direct examination, he was asked whether subsequent events justified his opinion upon that inspection (R. 457). He replied that the uncovering of pipe and the cutting into it during renovation of the building disclosed a condition "worse than I had found it to be in the beginning" (R. 458-459). Upon motion by petitioners' counsel that *"all* this testimony be stricken out," (italics added) it was stricken and an exception allowed (R. 463-464). The ruling was erroneous. *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 397 (C.A. 2). It was certainly prejudicial when added to the other rejections of evidence concerning the need for repairs. The fact that the jury heard the testimony before it was stricken (Pet. 12, 19-20) does not affect the result. The court of appeals plainly did not misstate the record (Pet. 19).

Petitioners' witness, Greenfield, a beneficial owner of the property and a real estate broker, explained the difference between the market value of $1,250,000 sworn to for tax reduction purposes and his testimony here of a market value of $3,850,000 for the same period on the ground that a different standard of market value has "been accepted and acted upon by real estate people generally and the

taxing authorities in particular" (R. 55-58, 67-72). The Government sought to have its witness, Steiger, a lawyer and member of the Board of Tax Assessors of Philadelphia, testify on that point by way of rebuttal (R. 592-598). This was refused because he is not a real estate broker (R. 597, 743). As the discrepancy in the figures show, the question was important to the issue of market value here. The court of appeals correctly held that the Government should have been permitted to rebut the alleged view of the "taxing authorities" by such an authority. There were, thus, no misstatements concerning the record (Pet. 18).[3]

CONCLUSION

The decision below is correct. It presents neither conflict nor mistake. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] The court below held that other rulings of the trial court of which the Government complained were not a basis for reversal. If the petition for certiorari should be granted, the Government will again press this point.

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